

1987

The Saturnization of American Plants: Infringement or Expansion of Workers' Rights

Lori M. Beranek

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Beranek, Lori M., "The Saturnization of American Plants: Infringement or Expansion of Workers' Rights" (1987). *Minnesota Law Review*. 1843.
<https://scholarship.law.umn.edu/mlr/1843>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Comment

The Saturnization of American Plants: Infringement or Expansion of Workers' Rights?

General Motors Corporation (GM) and the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) recently entered into a labor agreement¹ stipulating the terms and conditions of employment² for GM's Saturn facility, a new subsidiary in Spring Hill, Tennessee.³ Under the Saturn Agreement, GM recognized the UAW as labor representative at the Saturn facility before hiring the start-up work force.⁴ Because the Agreement also provided that current GM workers would be given a hiring preference,⁵ many of

1. Memorandum of Agreement Between Saturn Corporation and UAW (June 28, 1985) (available at Minnesota Law Review) [hereinafter "Saturn Agreement" or "Agreement"]. The term "Memorandum of Agreement" implies no specific legal relationship, although the General Counsel analyzed the "Memorandum of Agreement" as a binding agreement and the National Right to Work Legal Defense Foundation asserted that it was a contract. *See* General Motors Corp., Saturn Corp., 122 L.R.R.M. (BNA) 1187 (June 2, 1986) (NLRB Gen. Counsel Advice Memorandum) [hereinafter "Advice Memorandum"].

2. *See* Saturn Agreement, *supra* note 1, at 1 (preamble). The Saturn Agreement states that "the UAW is recognized as the bargaining agent for the operating and skilled technicians in the Saturn manufacturing complex." *Id.* at 2. The Agreement also details the structure of the Saturn plant's work units, the responsibilities of workers within the units, the work and vacation schedule at Saturn, and a wage and seniority schedule that incorporates work experience at other GM facilities. *Id.* at 6-11, 18-21, Attachment No. 1.

3. GM intends to build a new subcompact car at the Saturn facility. The UAW became involved in the planning stages of plant development in 1983 when GM and the UAW established a study center to explore alternative approaches to staffing and operating a plant for car production in the United States. *See* Saturn Agreement, *supra* note 1, at 1 (Preamble); Advice Memorandum, *supra* note 1, at 1188. Management at the Saturn facility intends to hire 3000 workers to produce 250,000 cars yearly. Production is intended to begin in 1990. *Saturn Comes Down to Earth*, NEWSWEEK, Nov. 10, 1986, at 58, 58.

4. *See* Advice Memorandum, *supra* note 1, at 1188 ("[T]he UAW is recognized as the bargaining agent for the operating and skilled technicians in the Saturn manufacturing complex.").

5. *Id.* ("[T]o insure a fully qualified workforce, a majority of the full initial complement of operating and skilled technicians in Saturn will come from GM-UAW units . . .").

the workers who eventually would work at the Saturn facility were already members of GM-UAW bargaining units. The National Right to Work Legal Defense Foundation (Foundation)⁶ challenged the Agreement, claiming that it forced GM to prematurely recognize the UAW and thus preempted the newly hired employees' right to choose a labor representative.⁷ Re-

6. The Foundation is a self-proclaimed advocate for workers opposed to "compulsory unionism." The Foundation's objectives are "to enforce employees['] existing legal rights against forced unionism abuses" and to expand individual employees' rights. The Foundation receives funding from private contributions. THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., DEFENDING AMERICANS AGAINST INJUSTICES OF COMPULSORY UNIONISM (publicity brochure available at 8001 Braddock Rd., Springfield, Va. 22160).

7. The Foundation and the General Counsel agreed that the Saturn Agreement was signed before the hiring of all Saturn employees, *see* Advice Memorandum, *supra* note 1, at 1188 (agreement signed on July 23, 1985, but full complement of workers to be reached approximately two years after plant's opening), but disagreed on whether the agreement appoints the UAW as labor representative for the employees, *see id.* at 1191 (argument by Foundation that GM recognized the UAW at inappropriate time had no merit). The Foundation claimed that the Saturn Agreement extended prehire recognition to the UAW, violating § 8(a)(1), (a)(2), (a)(3), (b)(1), and (b)(2) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1), (a)(2), (a)(3), (b)(1), (b)(2) (1982). *See* Letter from Foundation to Rosemary Collyer, Esq., General Counsel of the NLRB (Dec. 6, 1985) at 3 (available at Minnesota Law Review). Prehire recognition is recognition of a union by an employer prior to plant opening. Because prehire recognition preempts the newly hired workers' rights established in § 7 of the NLRA, it is a violation of § 8(a)(1), (a)(2), and (a)(3). *See, e.g.,* Sheraton Great Falls Inn, 242 N.L.R.B. 1255, 1256 (1979) (employer's execution of collective bargaining agreement before hiring work force held improper).

Section 7 states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities

29 U.S.C. § 157 (1982). The rights guaranteed by § 7 may not be restricted by contract between management and the union. *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1280 (9th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985).

The rights extended under § 7 are enforced through the § 8 provisions. Section 8(a)(1) of the NLRA states that it is unlawful "to interfere with, restrain, or coerce employees in the exercise of [their] rights guaranteed in [§ 7]." 29 U.S.C. § 158(a)(1) (1982). Section 8(a)(1) is the broadest provision under § 8(a) and encompasses both derivative and independent violations. *See* 4 NLRB Ann. Rep. 52 (1939). An employer who violates any of the other subdivisions of § 8(a) has also committed a derivative violation of § 8(a)(1). *See id.* An independent violation of § 8(a)(1) occurs when the employer's conduct constitutes a general obstruction of the employee's rights established under § 7. The specific policy of § 8(a)(1) is to prohibit the use of management's economic power to interfere with employees' free choice in representation decisions.

jecting the Foundation's charges,⁸ the General Counsel of the National Labor Relations Board (NLRB) found that the Saturn Agreement did not hinder the newly hired workers' right to freely choose labor representation in a noncoercive setting.⁹ The General Counsel stressed that labor's immediate involve-

Teamsters, Local 633 v. NLRB, 509 F.2d 490, 493 (D.C. Cir. 1974). Although § 8(a)(1) is generally interpreted as requiring no evidence of wrongful motive, see NLRB v. Litho Press of San Antonio, 512 F.2d 73, 76 (5th Cir. 1975) (section 8(a)(1) is concerned with effect of employer's conduct, not employer's state of mind), some critics claim that courts implicitly examine the employer's motive. See Hamilton, *NLRB Proscription On Granting of Benefits During Election Campaigns—A Detriment to Employees*, 1981 ARIZ. ST. L.J. 723, 727 (Supreme Court analyzed employer's anti-union animus in § 8(a)(1) suit).

The comparable provision for unions, § 8(b)(1), states that it is an unfair labor practice for a labor organization "to restrain or coerce . . . employees in the exercise of the rights guaranteed in [§ 7]." The Board and courts, in keeping with Congress's perceived intentions, limit the scope of § 8(b)(1) to union tactics involving violence, intimidation, reprisals, or threat of reprisals. See NLRB v. Drivers Local Union 639, 362 U.S. 274, 290 (1960).

Section 8(a)(2) of the NLRA prohibits an employer from "dominat[ing] or interfer[ing] with the formation or administration of any labor organization or contribut[ing] financial or other support to it." 29 U.S.C. § 158(a)(2) (1982). Section 8(a)(3) of the NLRA prohibits an employer from "discriminat[ing] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1982). The comparable provision for unions, § 8(b)(2), prohibits a labor organization from "caus[ing] or attempt[ing] to cause an employer to discriminate against an employee in violation of subsection (a)(3)." 29 U.S.C. § 158(b)(2) (1982).

8. The General Counsel refused to issue an unfair labor practice complaint. Any person or organization may file an unfair labor practice charge with the appropriate regional director of the National Labor Relations Board. 29 C.F.R. § 102.9 (1986). Normally, the regional director determines whether a claim concerning an unfair labor practice has merit and on that basis issues or declines to issue an unfair labor practice complaint. See 29 C.F.R. § 101.2 (1986) (initiation of unfair labor practice cases); 29 C.F.R. § 101.4 (1986) (investigation of charges). The regional office investigates the charge and, in cases involving novel or complex issues, seeks the counsel of the Division of Advice, a branch of the General Counsel's staff. Note, *Developments in the Law—The Taft-Hartley Act*, 64 HARV. L. REV. 781, 786 (1951); see also 29 C.F.R. § 101.8 (1986) (complaints); 29 C.F.R. § 101.4 (1986) (investigation of charges); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 141-42 (1975) (General Counsel decides issue submitted and communicates decision in advice memorandum). The regional director then follows the instructions in the advice memorandum. Based on the advice memorandum, the director will dismiss the charge or issue a complaint. See 29 C.F.R. § 101.8 (1986) (issuance of a complaint); 29 C.F.R. § 101.5 (1986) (withdrawal of charges); 29 C.F.R. § 101.6 (1986) (dismissal of charges and appeals to General Counsel). If the regional director finds that the claim has merit, the General Counsel will prosecute the charge on behalf of the party and the NLRB. See 2 THE DEVELOPING LABOR LAW 1618-21 (C. Morris 2d ed. 1983).

9. See Advice Memorandum, *supra* note 1, at 1190 ("[I]t is not a foregone conclusion that employees will be actually represented by the UAW . . . [I]f

ment in the Saturn plant was contingent on providing employees the opportunity to choose representation prior to full production.¹⁰

The Saturn Agreement exemplifies management and labor's new attitude toward industrial relations. For the past ten years, foreign business has demonstrated that cooperative labor relations can enhance productivity.¹¹ Heeding this lesson,

the UAW does not obtain the free support of a majority of Saturn unit employees, the UAW will not be their collective bargaining representative.”).

The General Counsel conditioned the legality of the Saturn Agreement upon majority approval by the hired Saturn employees, concluding that the agreement alone did not establish that the parties were functioning in a collective bargaining relationship. *See* Advice Memorandum, *supra* note 1, at 1191; *see also infra* notes 89-93 and accompanying text. The General Counsel relied on the principle established in *Houston Division of Kroger Co.*, 219 N.L.R.B. 388 (1975), to support its finding that the parties had not entered a collective bargaining agreement. For full discussion of *Kroger*, *see infra* notes 59-60 and accompanying text.

A party may appeal the regional director's decision directly to the General Counsel, even if the regional director's decision is based on the Office of Advice memorandum. *See* 29 C.F.R. § 101.8 (1986) (issuance of a complaint); 29 C.F.R. § 101.5 (1986) (withdrawal of charges); 29 C.F.R. § 101.6 (1986) (dismissal of charges and appeals to General Counsel). The Foundation appealed the Regional Director's decision, and on November 17, 1986, the General Counsel affirmed the finding of the Office of Advice, dismissing the Foundation's appeal. *See* Daily Lab. Rep. (BNA) No. 221, at E-6 (Nov. 17, 1986) (available on LEXIS).

The courts have interpreted 29 U.S.C. § 153(d) and § 160(b) to grant unreviewable discretion to the General Counsel in determining whether an unfair labor practice exists. 29 U.S.C. § 153(d) states: “The General Counsel . . . shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title” *See Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (General Counsel's refusal to institute an unfair labor practice complaint was unreviewable); *NLRB v. Pincus Bros., Inc.-Maxwell*, 620 F.2d 367, 386 (3d Cir. 1980) (Gibbons, J., dissenting) (General Counsel's determination was unreviewable); *Haleston Drug Stores v. NLRB*, 187 F.2d 418, 421 (9th Cir.) (Board's authority to investigate and issue charges is invested in General Counsel), *cert. denied*, 342 U.S. 815 (1951); *Peck, A Proposal to End NLRB Deferral to the Arbitration Process*, 60 WASH. L. REV. 355, 376 (1985) (General Counsel's decision is generally unreviewable).

10. *See infra* notes 91-93 and accompanying text.

11. *See* Ken'ichi, *The Competition Principle in Japanese Companies and Labor Unions*, 31 JAPAN Q. 25, 25-26 (1984) (stating Japan's success rests in loyalty of workers who are assured that management will lay them off only in a rare circumstance). One writer suggests that increased productivity results from Japan's allegiance to higher quality products, which in turn requires greater participation from workers. *See* Weinberg, *Cooperation Broke Out and Is Here to Stay*, 35 PROC. OF N.Y.U. THIRTY-FIFTH ANN. CONF. ON LABOR 117, 118-19 (1983). *See generally* Guest, *Participation: Why the Interest?*, in PUTTING PARTICIPATION INTO PRACTICE 11-13 (1979) (suggesting increased productivity results from the use of untapped intellectual potential of increasingly better educated workers, the delegation of control to workers immediately ca-

United States management has initiated a variety of coopera-

pable of handling unpredictable problems, and the lessening of industrial conflict which results from joint decision making).

U.S. Department of Labor statistics show that between 1976 and 1982, the United States consistently outranked Japan and Germany in the number of working days lost due to work stoppages.

| Working days lost (in thousands) | U.S. | Japan | Germany |
|-------------------------------------|--------|-------|---------|
| 1976 | 23,962 | 3254 | 534 |
| 1977 | 21,258 | 1518 | 24 |
| 1978 | 23,774 | 1357 | 4281 |
| 1979 | 20,409 | 930 | 483 |
| 1980 | 20,844 | 1001 | 128 |
| 1981 | 16,908 | 554 | 58 |
| 1982 | 9061 | 538 | 15 |

U.S. DEPT. OF LABOR, *Work Stoppages, Workers Involved, and Worktime Lost, 14 Countries, 1955-83*, HANDBOOK OF LABOR STATISTICS BULL. 2217, Table 138, at 447-49 (June 1985). Coupled with statistics on labor output, the numbers indicate that one explanation of the decline in U.S. productivity in relation to its competitors is that labor strikes and unrest cause a slowdown in general output.

| Output per hour [1977=100] | U.S. | Japan | Germany |
|-------------------------------|-------|-------|---------|
| 1976 | 97.5 | 93.3 | 96.1 |
| 1977 | 100.0 | 100.0 | 100.0 |
| 1978 | 100.8 | 107.9 | 102.5 |
| 1979 | 101.5 | 117.4 | 107.4 |
| 1980 | 101.7 | 128.6 | 108.8 |
| 1981 | 105.3 | 135.7 | 111.4 |
| 1982 | 106.5 | 146.8 | 113.3 |

U.S. DEPT. OF LABOR, *Indexes of Output per Hour, Hourly Compensation, Unit Labor Costs, and Related Measures for Manufacturing, Selected Countries, 1950-83*, HANDBOOK OF LABOR STATISTICS BULL. 2217, Table 129, at 425 (June 1985).

The cooperative labor relations model evident in some foreign countries has influenced American labor relations. See, e.g., St. Antoine, *Legal Barriers to Worker Participation in Management Decision Making*, 58 TUL. L. REV. 1301, 1317 & nn.71-72 (1984) (attributing change in American management's attitude to alarm over worker unrest and glowing accounts of Japanese success with similar programs); Sims & Dean, *Beyond Quality Circles: Self-Managing Teams*, 62 PERSONNEL, Jan. 5, 1985, at 25, 25 (Japanese success with quality circles stimulated American management's interest); Batt & Weinberg, *Labor-Management Cooperation Today*, HARV. BUS. REV., Jan.-Feb. 1978, at 96, 101 (labor-management committees in the steel industry grew out of the crisis caused by Japanese and German competition). Cf. Address by Prof. John T. Dunlop of Harvard University on Legal Framework of Industrial Relations in the United States, DAILY LAB. REP., No. 194 at E-1, E-3 (Oct. 7, 1985) (available on LEXIS) ("Many factors, of course, influence our economic performance . . . [W]ith aggregate labor costs constituting two-thirds total, it is fully appropriate to look critically at performance at the work place. A national industrial relations system that exalts the litigious . . . [is] a millstone around our economic neck.").

tive labor-management ventures.¹² Faced with diminishing membership,¹³ labor organizations have likewise become increasingly receptive to cooperative ventures, partly because such changes heighten labor's attractiveness to workers.¹⁴ The Saturn Agreement is the next step in this development of management and labor relations.¹⁵ Under this new type of coopera-

12. According to officials, early attempts to use Japanese techniques at three U.S. auto plants, Nissan, Honda, and New United Motors Manufacturing, Inc., have proven successful because of employee participation in decision making, teamwork, and job security. *See Report on Japanese-Style Management at U.S. Plants*, 122 LAB. REL. REP. (BNA) 208, 208 (July 28, 1986); *see also infra* notes 16-18, 63-69 and accompanying text.

Those engaged in the development of the Saturn facility examined the structure of foreign plants before developing Saturn. *See How Power will be Balanced on Saturn's Shop Floor*, BUS. WK., Aug. 5, 1985, at 65, 66. *Cf.* Weinberg, *supra* note 11, at 119-20 (faced with foreign competition and changes in technology, management and labor have planned for survival and recovery through cooperation).

13. Union membership has steadily declined in the last thirty years, as the following statistics indicate:

| <u>Year</u> | <u>Ratio of Union Membership to Nonagricultural Workforce</u> |
|-------------|---|
| 1945 | 35% |
| 1954 | 35% |
| 1965 | less than 30% |
| 1980 | just over 20% |

Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1771 (1983). This decline in union membership may be the result of a recent change in employee attitude. Noting this change, Edward B. Miller, past chairman of the NLRB, states: "Today's employee is not in love with either unions or employers. He or she is interested in his or her individual future." Miller, *The National Labor Relations Board: From 1970 and Into the Future*, 15 STETSON L. REV. 21, 27 (1985). In 1984 the Consumer Population Survey reported that 15.6% of the private sector wage and salary workers were union members. Weiler, *Milestone or Tombstone: The Wagner Act at Fifty*, 23 HARV. J. ON LEGIS. 1, 3 n.4 (1986). *Cf.* Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510, 517 & nn.53-56 (1973) (discussing worker disinterest in class struggle).

14. Workers increasingly are focusing on protection of a business's "long range ability to provide a solid future" rather than immediate wage increases. Fischer, *New Challenges for Labor and Management Achieving a Cooperative Climate*, 35 PROC. OF N.Y.U. THIRTY-FIFTH ANN. CONF. ON LABOR 89, 89-92 (1983). This shift in interest has led workers to support cooperative programs that substitute greater decision-making input and profit sharing for wage increases. *See infra* notes 65-68 and accompanying text; *When Employees Run Their Own Steel Mill*, U.S. NEWS & WORLD REP., May 7, 1984, at 77. Unions have begun negotiating with labor's new interests in mind. *See* Bradley & Gelb, *Employee Buyouts of Troubled Companies*, HARV. BUS. REV., Sept.-Oct. 1985, at 121, 127 (local unions support employee ownership despite its adverse effects on employment and wage levels).

15. The Saturn Agreement involves labor in the planning and develop-

tion, management forms a long-term partnership with labor and engages labor's input in the early stages of planning, decision making, and development.¹⁶ Early cooperation allows management to tap into labor expertise on decisions concerning the plant's functioning and design¹⁷ and establishes a harmonious climate for future negotiations.¹⁸

Despite the merits of cooperative ventures, however, the National Labor Relations Act (NLRA) threatens to inhibit the new spirit of cooperation in labor-management relations.¹⁹ As

ment stages of plant operation. See Whiteside, *GM's Bold Bid to Reinvent the Wheel*, BUS. WK., Jan. 21, 1985, at 34, 34-35 (GM "invited the UAW at the start to help design the car, lay out the plant, and set up production equipment"); see also *supra* note 3 and accompanying text.

16. Other cooperative ventures in which a union became involved in decision making prior to the hiring of workers include New United Motor Manufacturing, Inc., a GM-Toyota plant in Fremont, California, and an LTV Steel Company plant in Cleveland, Ohio. Hoerr, *The NLRB Strikes a Blow for Worker Participation*, BUS. WK., June 16, 1986, at 36. The UAW also anticipates early representation at a Toyota plant to be constructed in Georgetown, Kentucky; a Mazda Motor Company plant to be built near Detroit, Michigan; and a Mitsubishi-Chrysler plant planned for Peoria, Illinois. *Id.* The United Mine Workers, the International Brotherhood of Electrical Workers, and management at American Motors (before its merger with Chrysler) and other GM facilities also have voiced interest in creating Saturn-type agreements. See Maynard, *A Labor Deal That Clears Way for GM's Saturn*, U.S. NEWS & WORLD REP., Aug. 5, 1985, at 22. Foreign countries also have experimented with worker participation in early research and development. See, e.g., Howard, *UTOPIA: Where Workers Craft New Technology*, TECH. REV., Apr. 1985, at 42, 42-43 (Swedish printing unions, systems designers, and scientists are engaged in research effort to design new computerized equipment for printing industry). One labor expert asserts that, despite the lack of publicity, some labor input into preliminary decisions, such as plant site, must occur at present within cooperative programs. See Weinberg, *supra* note 11, at 119.

17. The UAW aided GM in the design of the work system at Saturn. See Hoerr, *supra* note 16, at 36. Similarly, other labor unions have helped design plant layouts in relocation and expansion situations. See Batt & Weinberg, *supra* note 11, at 96, 98.

18. National leadership in labor unions and industry management often develop a relationship from past negotiations which they consider beneficial to maintain. Letter from Karin Green, Director of Labor Resource Service, AFL-CIO, to the author (January 15, 1987) (available at Minnesota Law Review).

19. See generally Fulmer & Coleman, *Do Quality-of-Work-Life Programs Violate Section 8(a)(2)?*, 35 LAB. L.J. 675, 676 (1984) (members of labor movement question legality of quality-of-work-life programs under § 8(a)(2)); Craver, *The Vitality of the American Labor Movement in the Twenty First Century*, 1983 U. ILL. L. REV. 633, 692-93 (worker ownership programs can raise questions of § 8(a)(2) violations). In light of the trend in United States industry towards innovative projects, the United States Department of Labor recently began a study of the power of national labor laws and bargaining traditions to inhibit greater cooperation between management and labor. See generally BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE

the Foundation's claims concerning the Saturn plant suggest, the right of individual employees to choose a labor representative may conflict with management's need for union recognition and input in the early stages of a project's development.²⁰ The General Counsel's decision attempted to accommodate both early cooperation and worker autonomy²¹ through an expansive interpretation of labor precedent.²²

This Comment examines the General Counsel's analysis of workers' voting and organizing rights under the Saturn Agreement. Part I describes the individual worker's legal right to choose representation and outlines the types of cooperative ventures with which management and labor are currently experimenting. Part II sets out the General Counsel's analysis of the Saturn Agreement. Part III analyzes whether the General Counsel's treatment of the Saturn Agreement provides adequate protection to workers and argues that Saturn-type agreements do not preclude workers from exercising their representation rights as long as those rights are properly safeguarded by the NLRB. The Comment concludes that the National Labor Relations Board must encourage cooperative ventures in early plant development to promote industrial stability.

PROGRAMS, U.S. DEP'T OF LABOR, PUB. NO. 113, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION (1987).

20. An early agreement between management and labor could be construed as a violation of § 8(a)(3), which strictly prohibits discrimination in favor of or against union employees with regard to hiring, *see supra* note 7 and accompanying text, and as a violation of § 8(a)(2), which prohibits employer dominance of a union, *see supra* note 7 and accompanying text; *infra* note 78.

21. The desire for early cooperation normally does not threaten worker autonomy. As several experts have noted, workers and management usually do not address the issues of wages or terms of employment in cooperative ventures. For example, participants treat quality of work life programs as vehicles for communicating other concerns, such as problems of efficiency and working conditions within the plant. Both management and labor recognize that the cooperative venture is not a substitute for collective bargaining. Because cooperative ventures do not take the place of negotiations, the traditional, autonomous relationship between labor and management should be maintained. *See Fulmer and Coleman, supra* note 19, at 678-79; Moberly, *Worker Participation and Labor-Management Cooperation Through Collective Bargaining*, 15 STETSON L. REV. 99, 109 (1985).

22. *See infra* text accompanying notes 88-102.

I. INDIVIDUAL WORKER RIGHTS AND COOPERATIVE VENTURES

The NLRA promotes stability in labor relations²³ by protecting the individual worker's right to choose a labor representative.²⁴ Because stability in labor relations also develops when workers freely choose to assert their rights as a collective unit,²⁵ protection of the collective bargaining process at times supercedes the interests of particular individuals. The new cooperative ventures potentially threaten both the employee's individual and collective rights. Various legal safeguards have therefore been developed to protect the employee's interests.

A. AN INDIVIDUAL EMPLOYEE'S RIGHT TO CHOOSE REPRESENTATION

An employee's individual and collective rights are protected in various ways. Section 7 of the NLRA ensures worker autonomy by guaranteeing the employee's right to join or refrain from joining a union²⁶ without coercion from union or

23. The National Labor Relations Act charges the NLRB with the duty of administering the Act in a fair and expeditious manner. *See Farmer, Transfer of NLRB Jurisdiction Over Unfair Labor Practices to Labor Courts*, 88 W. VA. L. REV. 1, 4 (1985). Congress vested control in the NLRB over representation proceedings and review of unfair labor practices, including pre-election violence, failure to bargain to impasse, and other acts which disturb labor-management relations. *See* 29 U.S.C. § 159(c) (1982). Protection of the collective bargaining process is thought to promote industrial peace and stability. *See* 79 CONG. REC. 7672 (1935) (statement of Sen. Walsh) ("What [the Wagner Act] does is seek to prevent strikes brought on as a result of the employer refusing to recognize and bargain collectively with the properly designated representatives of his employees.").

24. In passing the National Labor Relations Act (Wagner Act) in 1935, Congress stated:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing

Wagner Act, ch. 372, 49 Stat. 449, 449-50 (1935) (codified as amended at 29 U.S.C. § 151 (1982)).

25. The pervasiveness of this theory throughout other Board policies supports the view that workers are best protected when their interests are entirely divorced from those of management. *See, e.g., Wirtz, The New National Labor Relations Board: Herein of 'Employer Persuasion'*, 49 NW. U.L. REV. 594, 614 (1954) (suggesting that employers who promise benefits have undue influence over the election process and should be restricted).

26. Section 7 of the NLRA states:

Employees shall have the right to self organization, to form, join, or

management.²⁷ The labor union seeking to represent a group of employees must demonstrate that it has obtained approval from a majority of the bargaining unit²⁸ through an election or card count.²⁹ The NLRB limits the bargaining unit to a group of employees who share a "community of interests" concerning employment.³⁰ In determining whether employees share a

assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities

29 U.S.C. § 157 (1982).

27. See, e.g., *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948) (election set aside due to employer's anti-union speech that "impaired [the] employee's freedom of choice"), *enforced*, 192 F.2d 504 (6th Cir. 1951), *cert. denied*, 343 U.S. 904 (1952).

28. The bargaining unit is the designated unit from which the union must obtain majority support to become the collective bargaining representative of the employees. The NLRA provides that: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit." 29 U.S.C. § 159(a) (1982). In the absence of agreement between the employer and the organizing workers, the Board will determine the appropriate bargaining unit. See *id.*; cf. *NLRB v. J.J. Collins' Sons, Inc.*, 332 F.2d 523 (7th Cir. 1964) (unambiguous and specific agreement between employer and workers took precedence over Board discretion in determining appropriate bargaining unit).

29. A card count is a procedure by which signatures on union authorization cards (indicating a desire for union representation) are collected from employees and compared with the employees' signatures on the payroll to determine authenticity. 1 THE DEVELOPING LABOR LAW, *supra* note 8, at 489. If a majority of the employees in an appropriate bargaining unit voice support for the union through a card count, the employer may voluntarily enter into bargaining with the union. See, e.g., *San Clemente Publishing Corp.*, 167 N.L.R.B. 6, 7 (1967) (bargaining order supported by unofficial poll of employees agreed to by union and employer to determine majority status), *enforced*, 408 F.2d 367 (9th Cir. 1969). An employer who voluntarily agrees to recognize a union must, however, take "reasonable steps to verify union claims" to avoid a charge of unlawful dominance or support of a minority union. *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 739 (1961). An employer may lawfully refuse to recognize a union on the basis of a card count, in which case the Board will hold an election. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 580 (1969) (upholding the employer's refusal to bargain on the grounds that card counts were inherently unreliable).

30. 3 NLRB ANN. REP. 174 (1938). The rationale for the "community of interests" concept rests in the theory that the chosen representative must negotiate for the mutual benefit of all employees. See J. ABODERLY, R. HAMMER & A. SANDLER, *THE NLRB AND THE APPROPRIATE BARGAINING UNIT* 12 (1981). If workers' interests were dissimilar, the representative would be forced to bargain for several different sets of interests. Assuming that the task of pleasing everyone would ultimately become impossible, the arrangement would lead to dissatisfaction. *Id.* at 12.

Section 9(a) of the NLRA requires only that the unit be "appropriate" for

community of interests, the Board examines numerous factors, including the work structure of all the facilities to be included in the unit, the duties and benefits provided to the employees, and the interests and practices already present in the industry.³¹ The Act does not require, however, that collective bargaining be confined to the election unit. For example, several units may negotiate jointly with an employer.³²

After establishment of the bargaining unit, election of a union representative is usually required.³³ The election envi-

collective bargaining; it need not be the best unit for bargaining purposes. *See* 29 U.S.C. § 159 (1982). Section 9(b) refers to the unit as "employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(a),(b) (1982). *See* Morand Bros. Beverage Co., 91 N.L.R.B. 409, 418 (1950) ("There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate.'" (emphasis in original)), *enforced in part*, 190 F.2d 576 (7th Cir. 1951), *aff'd*, 204 F.2d 529 (7th Cir. 1953), *cert. denied*, 346 U.S. 940 (1954).

31. Working conditions include pay, benefits, work hours, work performed, and qualifications needed. The Board will also consider similarities among the facilities, functional integration of the firm, the firm's supervisory and organizational structures, and physical proximity of the sites. The Board also studies the bargaining history at the facilities, employees' desires, and the extent of union organization. *See* Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353, 383 (1984); *see also* J. ABODERLY, R. HAMMER & A. SANDLER, *supra* note 30, at 11-83.

32. *See* Leslie, *supra* note 31, at 381. In the auto industry, for instance, although each plant is treated as a separate "election" unit, the NLRB has long recognized that the UAW may negotiate as a companywide "bargaining" unit. *See* General Motors Corp. (Cadillac Motor), 120 N.L.R.B. 1215, 1217 (1958) ("[I]n consequence of this long history of collective bargaining and the exclusive recognition accorded the UAW by GM on a multiplant unit basis, there now exists a single companywide bargaining unit embracing all those plants of the company in which the UAW has in the past been recognized . . ."). Acknowledging that the UAW had been the almost exclusive organizer of GM employees, the NLRB in *General Motors Corp. (Cadillac Motor)* noted that the UAW won this right through 120 successive single plant elections and was certified as representative in each plant as a single bargaining unit. *See id.* at 1217. The Board further acknowledged that the UAW lawfully negotiated a single nationwide contract to which supplements containing the specific concerns of the local unit were attached. *See id.* Likewise, the designation of a particular bargaining unit is tied to a set of jobs or job classifications, not to a particular group of workers. *See* A. COX, D. BOK & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 279 (1986).

33. To determine whether an election is appropriate and necessary, the NLRB will conduct a preliminary investigation upon the filing of a representation petition by an employee. *See* 29 U.S.C. § 159(c)(1) (1982); 29 C.F.R. § 102.60. In this investigation the NLRB will determine whether the employer's operations are within NLRB jurisdiction, whether the appropriate bargaining unit has been designated, whether the employer has declined to voluntarily recognize the union, whether the petition is timely, and whether

ronment must be free from coercive activity.³⁴ Typically, the NLRB reasons that unfair labor practices³⁵ or conduct disrupting the "laboratory conditions" of the election setting³⁶ impose a coercive atmosphere upon an election.³⁷

the union has garnered support from a minimum of 30% of the employees. See R. WILLIAMS, NLRB REGULATION OF ELECTION CONDUCT 6-9 (rev. ed. 1985). If these factors are met, the NLRB will establish a date for the election to be conducted, generally 30 days following the decision. See *id.* at 11-12.

34. See *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948) ("In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees."), *enforced*, 192 F.2d 504 (6th Cir. 1951), *cert. denied*, 343 U.S. 904 (1952). Section 9(c) of the NLRA governs the duties of the Board regarding elections. 29 U.S.C. § 159(c) (1982). The Board has established formal procedures for implementing and conducting elections upon the petition of a union, employee, or employer to determine whether a labor union is entitled to recognition in collective bargaining. See 29 C.F.R. §§ 102.60-82 (1986) (Board's rules and regulations); 29 C.F.R. §§ 101.17-25 (1986) (statements of procedure).

35. Section 8 of the NLRA defines conduct which will be regarded as an unfair labor practice. Section 8(a) outlines prohibited employer activities; § 8(b) refers to conduct of labor organizations. See *supra* note 7 and accompanying text.

An unfair labor practice is presumptive evidence that the employees did not freely choose representation. See *Caron Int'l, Inc.*, 246 N.L.R.B. 1120, 1120 (1979) (rebutting presumption). The Board, as a general rule, will direct a new election whenever an unfair labor practice occurs, unless "the violations are such that it is virtually impossible to conclude that they could have affected the results of the election." *Super Thrift Markets, Inc.*, 233 N.L.R.B. 409, 409 (1977). The determination will be based on the number of violations, their severity, the extent of dissemination, the size of the unit, and other factors. *Id.*

36. The Board described its duty in *General Shoe Corp.* as "provid[ing] a laboratory in which an experiment may be conducted under conditions as nearly ideal as possible." *General Shoe Corp.*, 77 N.L.R.B. at 127. The Board stated further that "conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice . . ." *Id.* at 126.

37. The NLRB has strictly restricted employer and union speeches, leafletting, and campaign activities in the period immediately preceding an election to eliminate subliminal coercion. For example, the NLRB restricts employers from delivering "required attendance" speeches to groups of employees within 24 hours of an election. See *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429 (1953).

The NLRB provides two remedies for coercive activity. In cases involving unfair labor practices or conduct that disrupts "laboratory conditions," the Board may set aside the election and order a new election. NLRB, NLRB CASE HANDLING MANUAL 11.436 (1984); see also 1 THE DEVELOPING LABOR LAW, *supra* note 8, at 86. In extraordinary cases involving unfair labor practices so severe that their impact on the workers makes the probability of a fair second election virtually impossible, the Board may order the employer to bargain with the labor representative without the benefit of a representation election. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 580 nn.1-3, 588 (1969)

To ensure a coercion-free environment, the Board restricts the premature recognition of a union if the recognition may influence the election process.³⁸ The United States Supreme Court has held that an employer's early recognition of a union representative "taints" an election by giving the union "a marked advantage over any other in securing the adherence of employees."³⁹ Regardless of an employer's good faith belief that the union represents a majority of the employees, an employer violates the NLRA by recognizing a union which has not acquired approval from a majority of the workers.⁴⁰

Similarly, the Board restricts the employer's grant of benefits that may affect the employee's freedom of choice for or against unionization.⁴¹ In *NLRB v. Exchange Parts Corp.*,⁴² the Supreme Court found that employees implicitly understand

(employer ordered to bargain when it gave impression that union election would lead to the closing of plant).

38. See *Ravenswood Elec. Corp.*, 232 N.L.R.B. 609, 618 (1977) (employer recognition of union that did not represent uncoerced majority violated § 8(a)(1) and (a)(2) of NLRA); *Northrop Corp.*, 187 N.L.R.B. 172, 207 (1970) (signing and giving effect to collective bargaining contract was unfair labor practice because competing union's claim to recognition raised question of recognized union's majority status).

39. *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 738 (1961) (quoting *Labor Board v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267 (1938)).

40. *Id.* at 738-39. The Supreme Court found the argument that there was subsequent approval from a majority irrelevant, because the earlier recognition effectively denied the employees' right to choose a representative in a free setting. *Id.* at 736. The Board has enforced *International Ladies' Garment Workers'*, but has also attempted to mitigate any penalty against innocent violators of the premature recognition doctrine by permitting an employer to repudiate a premature recognition of a union through timely and unambiguous publication of the repudiation. See *Kroger Co.*, 275 N.L.R.B. 1478, 1480 (1985) (employer cured violation by withdrawing recognition, rescinding contract, and informing employees shortly after premature recognition).

41. An employer may not benefit one of two rival unions. See, e.g., *Ralco Sewing Indus., Inc.*, 243 N.L.R.B. 438, 445 (1979) (employer soliciting applicants from favored union); *Ravenswood Elec. Corp.*, 232 N.L.R.B. at 618 (employer allowing only favored union to organize employees on company property and company time); *Shreveport Packing Corp.*, 196 N.L.R.B. 498, 501-02 (1972) (employer soliciting employees and threatening to close plant if favored union lost election); *Northrop Corp.*, 187 N.L.R.B. at 207 (employer notifying workers of holiday and retroactive pay arrangements conditioned on favored union's negotiations prior to election). An employer also violates § 8(a)(2) by forming or urging its employees to form a company union. See, e.g., *Miller Materials Co.*, 244 N.L.R.B. 496, 499 (1979) (encouraging formation of employee committee by threatening to withhold wage increases for a year violated § 8(a)(2)); *G.Q. Sec. Parachutes, Inc.*, 242 N.L.R.B. 508, 516 (1979) (granting benefits through an employees' committee to discourage support for an independent union violated § 8(a)(2)); *World Wide Press, Inc.*, 242 N.L.R.B. 346, 368 (1979) (reestablishing

that benefits they have begun to rely on as compensation may be removed at the employer's discretion.⁴³ When applying *Exchange Parts*, the Board focuses on whether the grant of benefits is reasonably calculated to influence the employees' vote in the election.⁴⁴ The timing of the grant is particularly relevant to the Board's inquiry.⁴⁵

Despite the typical reliance on elections as clear proof of the workers' choice of representative,⁴⁶ elections occasionally are preempted by an established bargaining relationship between a labor union and employer. According to the Board, the stability created by the collective bargaining relationship may outweigh the possibility of detriment to the individual worker.⁴⁷ Frequently, these situations involve successorships, relocations, and accretions. In each, newly hired workers are

an employee organization, facilitating and promoting its efforts, and promising benefits contingent on selecting the organization violated § 8(a)(2)).

42. 375 U.S. 405 (1964).

43. *Id.* at 409 (underlying danger of a grant of benefits is the "suggestion of a fist inside the velvet glove").

44. *Red's Express, Inc.*, 268 N.L.R.B. 1154, 1155 (1984); *see also* *St. Francis Hospital*, 263 N.L.R.B. 834, 837 (1982) (wage increase calculated to erode union support was unlawful), *enforced sub nom. St. Francis Fed'n Nurses & Health Professionals v. NLRB*, 729 F.2d 844 (D.C. Cir. 1984); *Tressler Lutheran Home for Children*, 263 N.L.R.B. 651, 663 (1982) (promises of raises if employees voted against the union violated § 8(a)(1)); *Service Spring Co.*, 263 N.L.R.B. 812, 817 (1982) (improvements in working conditions during union drive violated § 8(a)(1)).

45. For example, the Board would not construe a wage increase that was routinely rewarded every six months as a violation. *See Gerkin Co.*, 279 N.L.R.B. No. 136, slip op. at 2 (June 25, 1986) ("[E]mployer must grant or withhold benefits 'as he would if a union were not in the picture.'" (quoting *Great Atlantic & Pacific Tea Co.*, 166 N.L.R.B. 27, 29 (1967))). Normally, the Board will proscribe the granting of benefits from the time that the election is ordered to the time it is carried out, a period of about 70 days. *See Hamilton, supra* note 7, at 725.

46. The Supreme Court has held that an employer faced with a demand for recognition by a labor organization has the right to insist upon an election as a means of determining a labor representative's majority status, provided the employer has not unfairly disrupted the election process. *See Linden Lumber Div. v. NLRB*, 419 U.S. 301, 310 (1974) (in absence of an unfair labor practice, union has burden of invoking Board's election procedure when employer refuses recognition based on authorization cards); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 609-10 (1969) (where employer's refusal to recognize and bargain is based on desire to dissipate union support rather than good faith doubt of majority status, Board may issue bargaining order without requiring an election).

47. *See Harte & Co.*, 278 N.L.R.B. No. 128, slip op. at 10-11 (Mar. 13, 1986) (national labor policy favoring achievement of industrial stability through collective bargaining process supported upholding existing relationship). *But see NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 306 (1972) (Rehnquist, J., dis-

protected by the continuity of the bargaining unit.⁴⁸ When analyzing the fairness to new workers, the Board asks whether the current members of the bargaining unit or the transferring workers share the interests of newly hired workers.⁴⁹ Similarity of interests ensures that the new workers' interests were adequately represented in any preceding negotiations.⁵⁰

For example, when a successor employer hires a majority of employees from a largely unchanged bargaining unit,⁵¹ the new employer must recognize the union representative if the successor operation is substantially similar to the predecessor operation.⁵² The presence of a majority of workers from the old work force satisfies the Board that leadership elected by the old bargaining unit also represents the interests of the new

senting) (industrial peace would be produced at the expense of employees' wishes, which the Act seeks to preserve).

48. See *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 468-69 (9th Cir. 1985) ("[T]he period immediately following a change in the employment relationship . . . is the time when employees, both holdovers and new hires, may need stability in their working environment most. A collective voice can help them achieve this stability by guarding against sudden changes in terms and conditions of employment."); see *infra* notes 53, 56 and accompanying text.

49. See *NLRB v. Jeffries Lithograph Co.*, 752 F.2d at 463-64 (Board will examine changes in working conditions to determine whether transferring workers' representative is likely to represent present employees' choice); *Safeway Stores, Inc.*, 256 N.L.R.B. 918, 918 (1981) (Board found a valid accretion "when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted"). To determine whether workers share common interests in accretion situations, the Board considers geographic proximity, interchange of employees, functional integration of departments, similarity of skills, and responsibilities of employees. *Id.*

50. See, e.g., *Border Steel Rolling Mills, Inc.*, 204 N.L.R.B. 814, 815 (1973) (substantial continuity in the nature of employment is significant in determining whether Board certification of a union is effective with respect to a successor-employer).

51. The Board will find that the bargaining unit has remained unchanged if the work terms and type of jobs within the unit remain the same. See, e.g., *id.* at 815-16; *Simmons Eng'g Co.*, 65 N.L.R.B. 1373, 1377-78 (1946) (operation unchanged if employer did not alter production methods, organization, or supervisory order).

52. See *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. at 278-79, 281-82 (1972). The Court held that a successor employer, upon a showing of majority status, is obligated to recognize the labor representative from the earlier, unchanged bargaining unit, but is under no duty to adopt the original employer's contract. *Id.* The Court also noted that it would have been a "wholly different case" if the Board had determined that the new employer's operational structure differed from that of the predecessor. *Id.* at 280.

Enforced recognition precludes newly hired workers from voting on representation, but not from influencing the labor representative in negotiating a new contract. See *supra* notes 48-51 and accompanying text; *infra* notes 54-57 and accompanying text.

unit.⁵³ The new employer, however, need not adopt the previously negotiated collective bargaining agreement.⁵⁴

Similarly, when an operation relocates, the employer must continue to recognize the union representative at the new facility.⁵⁵ Unlike a successor employer, however, a relocating employer must honor an existing collective bargaining agreement "if the operations at the new facility are substantially the same as those at the old" and transferees from the old facility constitute a "substantial percentage" of the work force.⁵⁶

Finally, the Board permits an employer and a union to agree to recognize the union at all future facilities owned by the employer, conditioned on approval by the new employees.⁵⁷

53. *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. at 280-81 (where bargaining unit was unchanged and a majority of old employees were hired, Board ordered employer to bargain with incumbent union).

54. *Id.* at 291 (setting aside Board's finding of a violation based on conclusion that new employer must accept previously executed collective bargaining contract); see also *Crawford Container, Inc.*, 234 N.L.R.B. 851, 859 (1978) ("[S]uccessor employer is free unilaterally to set initial terms on which he will hire the employees of the predecessor, but he may not refuse to hire the predecessor's employees . . . to avoid having to recognize the union.") (citing *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. at 279-82); *Spruce Up Corp.*, 209 N.L.R.B. 194, 195 (1974) (employer free to set initial terms for hiring), *enforced*, *NLRB v. Spruce Up Corp.*, 529 F.2d 516 (4th Cir. 1975). The Supreme Court has also stated, however, "[T]here will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. at 294-95.

55. See, e.g., *Harte & Co.*, 278 N.L.R.B. No. 128, slip op. at 6 (Mar. 13, 1986) (issue rested on whether new facility was operation similar to original).

56. Substantial percentage is approximately 40% or more. *Id.* The percentage will be computed on the "date that the transfer process was substantially completed." *Id.* at 8. The Board in *Harte* found that the date on which the final employee transfer took place was the appropriate time. *Id.* at 9.

The Board refers to this analysis as involving a "balancing [of] the newly hired employees' interest in choosing . . . union representation against the transferees' interest in retaining the fruits of their collective activity." *Id.* at 9-10. By permitting the transferees to retain union representation, the Board is apparently assuming that the new employees' interests are adequately protected by workers sharing common conditions of employment.

57. Unlike the Saturn facility, the new facilities are now considered to be part of the existing bargaining unit upon worker approval. See, e.g., *Smith's Management Corp. (Frazier's Market)*, 197 N.L.R.B. 1156, 1157 (1972) (employer required to honor a negotiated future facilities provision where new employees accreted to the existing unit); *U.S. Rubber Co. (Elkhart, Ind.)*, 109 N.L.R.B. 1293, 1294-95 (1954) (Board ordered a self-determination election to determine whether a newly opened warehouse should be included in a multi-warehouse bargaining unit). Given industry practices and prior rulings of the NLRB, however, the Saturn facility would not be considered part of a larger, industry-wide bargaining unit. See *supra* note 32 and accompanying text; *infra*

Traditionally, the agreement, referred to as an accretion clause, applied only to facilities within the same bargaining unit.⁵⁸ In *Houston Division of Kroger Co.*,⁵⁹ however, the Board similarly analyzed the accretion of future facilities *not* within the same bargaining unit. The Board held in *Kroger Co.* that an employer may agree to waive its right to demand an election to determine whether a union has majority support at these future facilities, as well as those within the same bargaining unit.⁶⁰

B. COOPERATIVE VENTURES

Although the NLRA separates individual interests from management interests,⁶¹ cooperative ventures are gaining popu-

note 113 and accompanying text. The Saturn facility will remain a separate bargaining unit.

58. See *Borg-Warner Corp. (UAW)*, 113 N.L.R.B. 152, 154 (1955) (where job classifications in new department were substantially the same as in other operations, newly hired employees constituted an accretion to existing unit), *petition for review denied sub nom. International Union, UAW v. NLRB*, 231 F.2d 237 (7th Cir.), *cert. denied*, 352 U.S. 908 (1956); *Westinghouse Elec. Corp. (Cleveland, Ohio)*, 79 N.L.R.B. 744, 745-46 (1948) (employees moved to new position substantially similar to that covered by existing bargaining unit were automatically represented by that unit). The NLRB analyzes the relationship between the existing bargaining unit and newly hired workers to determine whether they share a "community of interests." See *supra* note 49 and accompanying text; *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137-38 (1962) (affirmative showing of differing interests from established unit required to support request for severance); *Potash Co.*, 113 N.L.R.B. 340, 343 (1955) (company servicemen who worked in same department under same supervisors included within production employee unit). For a discussion of the factors considered, see *supra* notes 31, 49 and accompanying text.

59. 219 N.L.R.B. 388 (1975).

60. See *id.* at 389 (additional store clause in agreement constituted waiver). The NLRB in *Houston Division of Kroger Co.* enforced an "accretion type" clause at a facility that could, under the law, be considered a separate bargaining unit. *Id.* at 388 (holding that "'additional store clauses' are valid in situations where the Board is satisfied that the employees affected are not denied their right to have a say in the selection of their bargaining representative"). The Board also broke from precedent by finding that the second condition of an accretion clause, approval from newly hired employees, would be satisfied by a card count or vote subsequent to the agreement. See *id.* at 388 (finding that card majority conceded to by all parties was valid).

61. See Gross, *Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making*, 39 INDUS. & LAB. REL. REV. 7, 13-14 (1985) (concept of government as neutral guarantor of employees' free choice is inconsistent with the Wagner Act's concept of a government partial to collective bargaining). The original Wagner Act and the 1947 Taft-Hartley amendments established somewhat inconsistent purposes for the NLRA, indicating that the conflict between protection of the collective bargaining process and individual rights is entrenched within the Act itself. See *id.* at 13-14 (Wagner Act supporters did not envision NLRA as neutral guarantor of employee free choice;

larity. Encouraged by the Department of Labor and industrial relations experts alike,⁶² management has seized upon cooperative programs as a solution to increased international competition and unsettling market conditions.⁶³ Cooperative ventures are prolific and varied,⁶⁴ but typical examples include employee

rather, the Act was intended to promote collective bargaining). Compare 29 U.S.C. § 141 (1982) (no mention of collective bargaining process in Taft-Hartley amendment to the policy provision of NLRA) with 29 U.S.C. § 151 (1982) (original Wagner Act declaration stating that purpose of the Act is "to mitigate and eliminate . . . obstructions [to commerce] . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association"). But see K. MCGUINNESS, *THE NEW FRONTIER* NLRB 14 (1963) ("Neither in the original Wagner Act nor in any of its amendments did Congress express any concern over the protection of labor organizations as such. Always, its interest has been in the protection of the individual."). For example, the policy which permits a successor employer to recognize the union voted on in a prior election precludes any newly hired workers from exercising their representation rights. At the same time, however, the policy protects the collective bargaining unit from continuous challenges. See *supra* notes 47-57 and accompanying text.

62. Secretary of Labor William E. Brock has stated that the country must develop a solid atmosphere of cooperation, based on the concept of worker dignity and equality. Address by William Brock, Secretary of Labor, Sixteenth Constitutional Convention AFL-CIO (Oct. 30, 1985), reprinted in 1985 PROCEEDINGS OF THE SIXTEENTH CONSTITUTIONAL CONVENTION OF THE AFL-CIO 292. Professor John T. Dunlop has likewise stated: "It is widely said by press, politicians and pundits alike that the economic future of the country, even its competitive survival, mandates a higher degree of labor-management cooperation or even partnership." J. Dunlop, *supra* note 11, at E-1.

63. In Japan, management treats labor-management committees as a fundamental part of the company structure. Sims & Dean, *supra* note 11, at 25. Witnessing Japan's economic success, United States companies have attempted to emulate Japanese practices to obtain similar success. See *id.* at 25; *supra* notes 11-12 and accompanying text; *infra* notes 64-65 and accompanying text.

64. Cooperative ventures vary according to the amount of employee participation that is encouraged and management's attitude toward participating employees. See, e.g., Bradley & Gelb, *supra* note 14, at 121, 123 (Pan American employees exchanged a 10% wage cut and fifteen month wage freeze for \$35 million in shares and union representation on the board of directors); *Labor-Management Cooperation and Worker Participation: Elements of Program Development*, ARB. J., June 1985, at 67, 68 [hereinafter *Labor-Management Cooperation*] (Mass Transit Authority in Flint, Michigan involves workers in production level decisions by seeking their advice on purchases of new equipment.); *id.* (workers at the Ford plant in Edison, New Jersey, have the power to stop the assembly line when a problem prevents them from correctly doing their job); see also Richardson, *Courting Greater Employee Involvement through Participative Management*, SLOAN MANAGEMENT REV., Winter 1985, at 33. Richardson divides the participatory management programs into three levels. In level one management views employees as passive and focuses on improving communication and attitudes. In level two management views employees as active and seeks to involve employees in productivity improvement and cost management. In level three management views employees as partners and rewards employees' efforts with profit-sharing. *Id.*

stock ownership programs,⁶⁵ labor membership on the company board of directors,⁶⁶ labor-management committees,⁶⁷ agreements to give workers access to management's records,⁶⁸ and

65. By 1981 one-sixth of the Fortune 500 companies had established employee stock ownership plans (ESOPs). Rosen, *Making Employee Ownership Work*, 2 NAT'L PRODUCTIVITY REV. 13, 15 (1982-1983). Two forms of ESOPs exist: nonleveraged and leveraged. Companies implementing a nonleveraged ESOP establish a trust fund for employees into which they contribute stock or money to buy the stock in the employees' names. A leveraged ESOP is one in which the employer borrows the money to buy the shares for the employees. As the debt is paid, the shares are converted to the employees' possession. See *id.* at 16. Companies create ESOPs to permit employees to gain ownership without investing their liquid capital, to provide an employee benefit or retirement plan, to facilitate owner retirement, and to take advantage of the tax incentives provided by Congress for participating companies. See *id.* at 13, 15. For examples of employee stock ownership plans, see *Developments in Industrial Relations*, MONTHLY LAB. REV., May 1984, at 54, 54 (limited profit-sharing at GM and Ford); *Developments in Industrial Relations*, MONTHLY LAB. REV., Aug. 1982, at 56, 56 (Crown Zellerbach "gainsharing" plan); *Developments in Industrial Relations*, MONTHLY LAB. REV., July 1982, at 53, 53-54 (International Harvester profit-sharing plan); *Developments in Industrial Relations*, MONTHLY LAB. REV., June 1982, at 64, 64 (Wheeling Pittsburgh Steel Corp. preferred stock contribution).

66. Union leaders now sit on the boards of Pan American, Eastern, Chrysler, and McCreary Tire. Cappelli, *Union Gains Under Concession Bargaining*, 36 ANN. PROC. INDUS. REL. RES. A. 297, 301 (1983).

67. Labor-management committees are established for a variety of reasons, including improvement of communication, morale, productivity and work methods, skills development, work environment, and health and safety conditions. *Labor-Management Cooperation*, *supra* note 65, at 68. An estimated one-third of the Fortune 500 have established employee-management programs. Wallace & Driscoll, *Social Issues in Collective Bargaining*, in U.S. INDUSTRIAL RELATIONS 1950-80: A CRITICAL ASSESSMENT 199, 241 (1981).

The most common form of labor-management committees are quality circles (QCs) and quality of work life committees (QWLs). Created as small problem-solving units, QCs normally include a group of workers belonging to the same department or performing similar work who meet with first-line supervisors to discuss solutions to environmental or production problems. Sims & Dean, *supra* note 11, at 25-32. Quality of work life is described as a commitment of management and union to support local activities and experiments designed to increase employee participation in determining how to improve work. *Id.* at 29. Examples of quality of work life programs include the Ford plant in Sharonville, Ohio and the Buick Complex in Flint, Michigan. Copenhagen & Guest, *Quality of Worklife: The Anatomy of Two Successes*, 2 NAT'L PRODUCTIVITY REV., Winter 1982-1983, at 5, 5-12.

68. When workers have been asked to take wage cuts, employers have allowed unions to review company financial records. See generally Gould, *Union Involvement in Employer Decision-Making: Some Reflections on America and Europe*, 58 TUL. L. REV. 1322, 1323-24 (1984) (reviewing agreements granting the right to inspection of records). Such agreements include the 1983 Basic Steel Agreement, United Food and Commercial Workers and the Armour Co. negotiations, River Rouge Steel Co. and Local 600 of the UAW, and Crown Zellerbach Corp. and the Woodworkers Union. *Id.*

programs to assist laid-off employees.⁶⁹

Labor representatives have traditionally opposed these innovative programs.⁷⁰ Unions see their role as negotiators for employees threatened by the alternative employee-management relationship.⁷¹ Moreover, unions are aware of the conflicting views of labor and management and question management's motives in implementing cooperative programs.⁷² Despite their skepticism, however, unions have begun to support cooperative ventures in order to retain present and attract new membership.⁷³

69. The auto industry has established programs to retrain and relocate employees laid off in plant closings, as well as to assist them in searching for new jobs. See, e.g., Hansen, *Innovative Approach to Plant Closings: The UAW-Ford Experience at San Jose*, MONTHLY LAB. REV., June 1985, at 34, 35 (joint management-labor initiative to assist dislocated workers established at Ford plant); *Developments in Industrial Relations*, MONTHLY LAB. REV., June 1982, at 63, 63-64 (preferential hiring program established for laid off automotive employees of Rockwell International Corporation at company's aerospace plant).

70. See Levitan & Werneke, *Worker Participation and Productivity Change*, MONTHLY LAB. REV., Sept. 1984, at 28, 31 (U.S. labor organizations prefer adversarial relationship); Craver, *supra* note 19, at 679 (many union leaders believe cooperative programs create docileness in workers); see also *id.* at 694 (some union leaders believe employee ownership programs undermine worker solidarity and in the case of ESOPs, are instituted by employers in an effort to diminish worker enthusiasm for unionization); Fischer, *supra* note 14, at 100 (unions often hostile to cooperative efforts, fearing the unknown and new roles); Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367, 370-71 (1980) (unions emphasize confrontation rather than cooperation); Batt & Weinberg, *supra* note 11, at 96 (noting extensive commentary about labor union hostility in the U.S. towards cooperative programs in other countries).

71. See Cordova, *Workers' Participation in Decisions Within Enterprises: Recent Trends and Problems*, INT'L LAB. REV., Mar.-Apr. 1982, at 125, 135 (unions fear their roles will be usurped by other forms of worker participation); cf. Craver, *supra* note 19, at 674 (labor-management committees could eventually assume the responsibility of shop stewards and union officials). Management can alleviate labor skepticism by explicitly limiting the subjects which the cooperative program may address. See *Labor-Management Cooperation* *supra* note 64, at 69 (labor-management committees are often explicitly prohibited from handling collective bargaining issues, including grievances).

72. Unions fear that worker participation programs are methods of avoiding fair compensation. See Levitan & Werneke, *supra* note 70, at 32. See also Craver, *supra* note 19, at 674 (unions distrust cooperative ventures as "devices to increase productivity surreptitiously" and as "union-busting techniques"). Cf. Batt & Weinberg, *supra* note 11, at 96 (workers "do not wish to be junior partner[s] in success and senior partner[s] in failure") (quoting Thomas Donahue, executive assistant to the President of the AFL-CIO, in his discussion of the prevalence of cooperative programs at troubled companies).

73. Batt & Weinberg, *supra* note 11, at 97 (union leaders endorse labor-management committees). Unions are "willing to experiment because of their

Various legal safeguards exist to protect the individual employee's interests during early cooperative activities. Cooperative ventures require a shift in the power structure of the company, a change that management is often reluctant to fully support.⁷⁴ To include employees in meaningful decision making, cooperative programs must demand that workers share more of the decision-making power.⁷⁵ When faced with unfavorable conditions, however, management often reverts to traditional methods and makes final decisions without employee influence.⁷⁶ Because of these concerns, the law attempts to regulate this power balance by requiring that labor and management have separate representatives throughout the cooperative process.⁷⁷

Another legal safeguard protects the employee's individual interests in cooperative ventures. In the initial stages of union

interest in survival and protecting jobs." Weinberg, *supra* note 11, at 123; cf. Fischer, *supra* note 14, at 89 (change in fundamental economic realities will force unions "to participate in policies designed to promote growth, investment, productivity, strong competitive positions and whatever else it takes to assure good, secure jobs capable of providing for the needs of union members").

74. See Levitan & Werneke, *supra* note 70, at 32 (worker participation programs require a redistribution of power but "management in general is more likely to want workers to 'feel' involved rather than actually to help make policy").

75. *Id.* at 28, 32.

76. See Richardson, *supra* note 64, at 40 (cooperative ventures normally reach a crisis period when communication falters and management makes unilateral changes without employees' input); see also, Bradley & Gelb, *supra* note 14, at 127 (owner-workers at South Bend Lathe were first employees in the U.S. to strike "against themselves" because of management's refusal to concede wage increase).

77. The Board and the federal courts protect labor's independence from management under two provisions of the NLRA. The Board and the federal courts have evaluated most charges regarding the legality of a cooperative venture under § 2(5), which defines labor organizations, and § 8(a)(2) and (a)(3), which discusses employer dominance and support of the labor organization. 29 U.S.C. §§ 152(5), 158(a)(2), 158(a)(3) (1982). Section 2(5) defines "labor organization" as "any organization of any kind, or any agency or any employee representation committee or plan, in which employees participate and which exists for the purposes, in whole or in part, of dealing with employees concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." NLRA § 2(5), 29 U.S.C. § 152(5) (1982).

The Board and at least one court have permitted cooperative ventures to continue by excluding them from this definition. See *NLRB v. Streamway Div. of Scott & Fetzer Co.*, 691 F.2d 288 (6th Cir. 1982); *General Foods Corp. and American Federation of Grain Millers*, 231 N.L.R.B. 1232 (1977). But see *NLRB v. Ampex Corp.*, 442 F.2d 82, 84-85 (7th Cir.) (management violated NLRA by establishing communications committee), *cert. denied*, 404 U.S. 939 (1971); *NLRB v. General Shoe Corp.*, 192 F.2d 504, 507 (6th Cir. 1951) (enforc-

organizing, the employer's influence is most persuasive and potentially coercive.⁷⁸ To protect employees' interests during an organizing drive, the NLRA prohibits an employer or union from interfering with the right of an employee to either initiate or refrain from initiating union representation.⁷⁹

ing Board decision that Advisory, Grievance, Safety and Benefit Committee violated NLRA), *cert. denied*, 343 U.S. 904 (1952).

If the Board or court determines that a group is a labor organization under § 2(5), its formation must comply with all provisions of the NLRA, including § 8(a)(2) and (a)(3), which prohibits employer dominance, interference, or hiring discrimination with regard to that labor organization. *See supra* note 7 and accompanying text. *See generally* Note, *Worker Ownership and Section 8(a)(2) of the National Labor Relations Act*, 91 YALE L.J. 615, 620-27 (1982); Note, *supra* note 13, at 511-15.

78. Recognizing that an employer may seek to unduly influence developing unions, Congress established § 8(a)(2) of the NLRA, which prohibits employer dominance, interference, and unlawful support. Although often used interchangeably by the Board and federal courts, these three terms are delineated according to the degree of employer influence.

"Domination" of a union indicates an irreversible subjugation of the union to the employer's control. *Compare* *Lawson Co.*, 267 N.L.R.B. 463 (1983) (finding employer unlawfully dominated union when it sponsored election for employee committee, dictated its purposes, controlled its activities, and bargained with it in order to avoid dealing with rival union), *enforced as modified*, 753 F.2d 471 (6th Cir. 1985) *with* *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535 (6th Cir. 1984) (refusing to find employer dominance when employees freely chose committee members, meetings were held without management present, and negotiators were chosen and proposals made without employer input).

Employer "interference" involves less severe misconduct in which the employer attempts to influence the union but is not found to have irreparably damaged the union's autonomy. Common examples of employer interference include supervisor participation in union activity, *see, e.g.*, *Hillside Bus Corp.*, 262 N.L.R.B. 1254 (1982), recognition of the union prior to majority authorization, *see, e.g.*, *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961), and employer-voiced preference for one of two competing unions, *see, e.g.*, *Ralco Sewing Indus. Inc.*, 243 N.L.R.B. 438 (1979); *Independent Ass'n of Steel Fabricators*, 231 N.L.R.B. 264 (1977), *enforcement denied in part*, 582 F.2d 135 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979).

"Unlawful support" generally refers to employer acts of tangible benefit to a labor organization that are deemed less severe than dominating actions. *See, e.g.*, *NLRB v. Vernitron Elec. Components, Inc.*, 548 F.2d 24 (1st Cir. 1977) (holding that employer unlawfully supported union when it assembled employees, organized authorization card signatures, and immediately recognized union), *enforcing* 221 N.L.R.B. 464 (1975). The Board and courts have sought to distinguish unlawful support from permissive cooperation by focusing on the totality of the circumstances to determine whether the employer's activity would inhibit employees in their choice of representative and restrict the union from maintaining arms-length negotiations. *NLRB v. Keller Ladders S., Inc.*, 405 F.2d 663 (5th Cir. 1968), *enforcing* 161 N.L.R.B. 21 (1966); *Kaiser Foundation Hospitals, Inc.*, 223 N.L.R.B. 322, 325-26 (1976).

79. *See supra* note 7 and accompanying text.

II. THE GENERAL COUNSEL'S MEMORANDUM ON THE SATURN AGREEMENT

When the Foundation challenged the Saturn Agreement, it asserted that GM prematurely recognized the UAW and thus prevented Saturn employees from freely choosing nonunion status or a different union representative.⁸⁰ The General Counsel prefaced its analysis of the Foundation's claim by noting that GM and the UAW were parties to an existing, productive labor-management relationship.⁸¹ As such, they had a duty to negotiate in good faith over management decisions such as the Saturn venture, which could endanger employees' jobs.⁸²

Emphasizing that the Saturn Agreement was the product of that existing, productive relationship, the General Counsel rejected the Foundation's argument that UAW interaction with GM and GM favoritism toward UAW-affiliated workers in hiring discriminated against non-UAW members.⁸³ The General Counsel found that the Saturn Agreement benefitted all GM employees working in designated UAW-represented units, regardless of their status as union members.⁸⁴ Because the Agreement gave a hiring preference to any current GM worker, nonunion members within UAW-represented units would have

80. Advice Memorandum, *supra* note 1, at 1189. For a general description of the Saturn Agreement, see *supra* notes 2-5.

81. Advice Memorandum, *supra* note 1, at 1189 ("GM and the UAW have had a long and productive collective bargaining relationship.").

82. *Id.* The General Counsel initially determined that the Saturn Agreement was a valid product of "effects" bargaining under *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). As the General Counsel noted, "effects" bargaining is mandated when an employer's decision will result in job losses, including layoffs, transfers, and relocations. Advice Memorandum, *supra* note 1, at 1189 (citing *Otis Elevator Co.*, 269 N.L.R.B. 891 (1964)). The General Counsel found that the success or failure of Saturn may determine whether other GM plants in the U.S. will be closed, and therefore "effects" bargaining was necessary. Advice Memorandum, *supra* note 1, at 1190.

83. Advice Memorandum, *supra* note 1, at 1189 (preference given to GM employees represented by the UAW was not unlawful). The basis for the Foundation's contention is § 8(a)(3) of the NLRA. 29 U.S.C. § 158(a)(3) (1982); see *supra* note 7 and accompanying text. "Discrimination" under § 8(a)(3) has a narrower interpretation than the common understanding of the term, referring exclusively to favoritism or exclusion on the basis of union status. 1 *THE DEVELOPING LABOR LAW*, *supra* note 8, at 182-83.

84. Advice Memorandum, *supra* note 1, at 1190. The General Counsel conceded that "the preference given to GM employees represented by the UAW may have some negative impact on the employment prospects of others." *Id.* It concluded that the NLRA did not prohibit an employer from preferring its own employees over other applicants. *Id.* at 1191; cf. *Courier-Citizen Co. v. Local 11*, 702 F.2d 273, 276 n.4, 277-78 (1st Cir. 1983) (upholding arbitration award enforcing a preferential hiring agreement between bargaining units of

equal access to the Saturn jobs.⁸⁵ The Agreement therefore did not exclude workers on the basis of union membership.⁸⁶ The preferential hiring provision applied to all members of the selected bargaining units.⁸⁷

The General Counsel next determined that the Agreement permitted employees to hold an election after hiring was completed.⁸⁸ Expanding on *Houston Division of Kroger Co.*, the General Counsel found that the omission of an express condition that the UAW obtain majority status did not indicate a lack

an employer). A union may also lawfully obtain this type of benefit for its members. *Local 357 Teamsters v. NLRB*, 365 U.S. 667, 675-76 (1961).

The General Counsel correctly noted that UAW units could not legally exclude nonunion members under §§ 8(a)(3) and 14(b) of the NLRA and state right-to-work laws. See 29 U.S.C. §§ 158(a)(3), 164(b) (1982). The first proviso of § 8(a)(3) prohibits an employer from hiring on the basis of union status, eliminating the earlier practice called the "closed shop." Under a closed shop agreement, the employer agreed to condition hiring upon union membership. 2 THE DEVELOPING LABOR LAW, *supra* note 8, at 1362. The NLRA permits the union and management, however, to enter into agency shop agreements in which employees may be required as a condition of employment to obtain, at a minimum, dues paying union membership within 30 days of hiring. See 29 U.S.C. § 158(a)(3)(1982) ("[N]othing in this [Act] . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment . . ."); see also *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). The exception to § 8(a)(3) is found in § 14(b) which permits the states to limit agency shop agreements. See NLRA § 14(b), 29 U.S.C. § 164(b) (1982) ("Nothing in this [Act] shall be construed as authorizing the execution . . . of agreements requiring membership in a labor organization as a condition of employment in any State . . . in which such execution . . . is prohibited by State . . . law."). States with right-to-work laws permit employees to work at unionized plants without joining the union, regardless of the agreement established through collective bargaining. By 1980, 20 states had statutes or constitutional provisions outlawing agency shop arrangements and enacting right-to-work laws. 2 THE DEVELOPING LABOR LAW, *supra* note 8, at 1392. UAW units in states with right-to-work laws undoubtedly contain nonunion employees. Therefore, favoritism towards certain UAW units will include benefits to nonunion workers as well as union members.

85. Advice Memorandum, *supra* note 1, at 1190. The General Counsel indicated that the Saturn Agreement extended preferential hiring to nonunion GM workers within UAW-represented units as well as to UAW members. *Id.*

86. The General Counsel noted that UAW-represented employees who were not working for a GM unit covered by the Saturn Agreement would not receive the benefit of a hiring preference. *Id.* Thus, GM was not favoring workers because of union membership, but because they were GM employees in the desired units. *Id.*

87. *Id.* ("If an employee is in a unit of employees represented by the UAW, that employee obtains the preference, irrespective of whether he/she is actually a member of the Union.").

88. *Id.* at 1191 ("[T]he Board will read into the agreement the condition that the UAW must achieve majority status.").

of intent to comply with the law on the part of GM or the UAW.⁸⁹ The General Counsel therefore read into the Agreement a condition that the UAW obtain majority status before full implementation of the Saturn Agreement.⁹⁰ The General Counsel stated that it was an agreement "in futuro, if and when the UAW achieves majority support."⁹¹ Because the Agreement was conditional, once hired, the workers could accept UAW leadership, choose a different union representative, or become a nonunion facility. Finding that the Agreement did not unlawfully interfere with that choice or establish anything more than a conditional relationship, the General Counsel held that the remaining evidence was insufficient to show that the parties had entered into an immediate "functioning collective bargaining relationship."⁹²

The General Counsel speculated, however, whether GM and the UAW could have legally entered into an immediate collective bargaining relationship.⁹³ Discussing a recent relocation decision,⁹⁴ the General Counsel reiterated that the Board requires an employer and a union to engage in good faith bargaining when the workers' employment is threatened.⁹⁵ The General Counsel also observed that in *NLRB v. Burns International Security Services, Inc.*,⁹⁶ the Court determined that a new employer has an obligation to bargain with a previously unionized unit when it is "perfectly clear" that the successor employer "plans to retain" the employees from the predecessor unit.⁹⁷ The General Counsel determined that under the Saturn relationship, the intention of the employer to hire union em-

89. The Board assumed, as it did in *Kroger*, that the parties intended their agreement to be lawful. *Id.*

90. *Id.*

91. *Id.*; see also *id.* at 1190 ("[I]t is not a foregone conclusion that employees will be actually represented by the UAW.").

92. *Id.* at 1192.

93. *Id.* at 1191 ("That issue is not free from doubt.").

94. *Harte & Co.*, 278 N.L.R.B. No. 128 (March 13, 1986).

95. Advice Memorandum, *supra* note 1, at 1191-92. The General Counsel noted that the Board's approval of prehire recognition in *Harte* was based on the parties' obligation to engage in good faith bargaining when workers' employment is threatened, the substantial number of transferring employees in the new work force, and national labor policy favoring "industrial stability achieved through the collective bargaining process." *Id.* (citing *Harte & Co.*, 278 N.L.R.B. No. 128, slip op. at 11 (March 13, 1986)). While noting that the same factors were present in the Saturn situation, the General Counsel acknowledged that *Harte* might be distinguishable, because it involved relocation of an existing plant, not the establishment of an entirely new facility. *Id.*

96. 406 U.S. 272 (1972).

97. *Id.* at 294-95.

ployees was "perfectly clear."⁹⁸ Not only had GM explicitly stated its desire to hire UAW workers,⁹⁹ but the UAW workers had also shown a strong desire to work at Saturn.¹⁰⁰ Under these circumstances, the General Counsel asserted that the *Burns* rationale permitted GM's conditional recognition of the UAW as labor representative.¹⁰¹

Despite its suggestion that *Burns* was relevant, the General Counsel refrained from basing its decision on *Burns*. Although *Burns* would permit the NLRB to liberally predict that enough workers from a previous unit would transfer to the new plant and thus create a successor plant, the *Burns* Court did not address a situation involving a new election unit, a new plant, and a different operation.¹⁰² Noting that reliance on *Burns* in the Saturn situation might be controversial, the General Counsel reasserted its position that the Agreement itself did not place the parties in a collective bargaining relationship.¹⁰³

98. Advice Memorandum, *supra* note 1, at 1192.

99. *Id.* ("[T]he Employer has agreed to extend offers of employment so that a majority of the Saturn workforce will come from the ranks of its own employees who are now represented by the UAW.").

100. *Id.* (noting GM-commissioned poll which revealed that 114,000 to 145,250 GM workers would consider working for Saturn Corporation).

The Saturn Agreement also provided a strong incentive for newly hired Saturn employees to remain affiliated with GM. The Saturn Agreement contained favorable terms of employment, including established wages and work schedules for part of the work force, and provided an underlying promise of lateral movement within the industry. *See supra* note 2 and accompanying text. GM indicated through the Saturn Agreement itself that it would consult the UAW when movements of workers from one plant to another occurred. *See Saturn Agreement, supra* note 1, at 15 (discussing job security). Provisions of the Saturn Agreement indicate that 80% of the Saturn employees will be guaranteed job security. *Id.* at 14-15. In the event of a layoff or plant closing, the UAW workers have the advantage of belonging to a union which has a proven record of successful negotiations with GM, as evidenced by the Agreement itself.

101. Advice Memorandum, *supra* note 1, at 1192.

102. *Id.*

103. *Id.* This analysis of the Saturn Agreement was subsequently confirmed by the General Counsel's statement that the Agreement did not unlawfully infringe upon the workers' rights. *See* Letter from NLRB General Counsel Collyer to National Right to Work Legal Defense Foundation on Dismissal of Saturn Case, DAILY LAB. REP., (BNA) No. 221, at E-1 (Nov. 17, 1986) (available on LEXIS); Advice Memorandum, *supra* note 1, at 1189-91 (discussing job preference issue).

III. ANALYSIS AND RECOMMENDATIONS

A. ANALYSIS OF THE GENERAL COUNSEL'S APPROACH TO THE SATURN AGREEMENT

In its decision the General Counsel unfortunately paid little attention to the employees' individual interests. The General Counsel also failed to address the implications of the Saturn Agreement for nonunion workers. Despite these shortcomings, however, the General Counsel accurately assessed the Saturn situation when it found that the Agreement was lawful.

1. The Saturn Agreement's Protection of Individual Interests During Negotiations

The General Counsel's opinion represents a subtle shift in labor policy away from an emphasis on securing individual rights to an interest in stabilizing labor-management relations.¹⁰⁴ The General Counsel relied upon precedents involving management and unions with existing collective bargaining relationships to demonstrate that UAW leadership from other facilities acted in the Saturn negotiations as the appropriate representative for the new Saturn workers.¹⁰⁵ By analyzing the Saturn Agreement in terms of what it perceived as an existing

104. Court decisions exhibit a trend towards interpreting the prohibition against employer dominance in § 8(a)(2) of the NLRA to regulate actual employer dominance of the union, rather than potential dominance. Compare *NLRB v. Newport News Co.*, 308 U.S. 241, 251 (1939) (affirming the disestablishment of employer-assisted labor organization despite showing of employer "good motive" and employee satisfaction) and *Bethlehem Shipbuilding Corp. v. NLRB*, 114 F.2d 930, 940 (1st Cir. 1940) ("In applying the statutory test of independence it is immaterial that the plan had in fact not engendered, or indeed had obviated, serious labor disputes in the past . . ."), *cert. denied*, 312 U.S. 710 (1941) with *NLRB v. Northeastern Univ.*, 601 F.2d 1208, 1214-16 (1st Cir. 1979) (reversing NLRB ruling finding potential domination); *Federal-Mogul Corp. v. NLRB*, 394 F.2d 915, 918 (6th Cir. 1968) (stating that unstable labor organization susceptible to managerial control does not create inference of actual dominance) and *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165, 167-68 (7th Cir. 1955) (implementing actual dominance analysis for § 8(a)(2) disputes). Courts also consider employees' actual impressions of the employer's conduct and the employer's motives for participation. See, e.g., *NLRB v. Newman-Green, Inc.*, 401 F.2d 1, 4-6 (7th Cir. 1968) (attempt to affect union election improper motive but facilitating committee activity was not). See generally Note, *supra* note 13, at 511 ("Although never made explicit, the traditional standard in § 8(a)(2) cases is essentially a per se rule.").

105. See Advice Memorandum, *supra* note 1, at 1189, 1191 (citing *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981)); *Harte & Co.*, 278 N.L.R.B. No. 128, slip op. at 6 (March 13, 1986); *Otis Elevator Co.*, 269 N.L.R.B. 891 (1964).

relationship between GM and the UAW,¹⁰⁶ the General Counsel subjected the issue of individual rights to less rigid scrutiny.

Through this unquestioning reliance on precedent involving an existing collective bargaining relationship, however, the General Counsel failed to scrutinize carefully the differences between the interests of UAW leadership negotiating the Saturn Agreement and the newly hired Saturn employees. UAW officials could have granted concessions in the Saturn negotiations to protect the rights of members at other UAW facilities at the expense of the Saturn employees. Likewise, members at other facilities, to protect their own positions, could have pressured negotiators to bargain conservatively with regard to concessions at Saturn. The General Counsel's reliance on precedent involving existing collective bargaining relationships simply ignores the Saturn facility's status as an election unit separate from other GM facilities.

Because the auto industry and the UAW share common interests, however, it is reasonable to conclude that UAW negotiators knew the principle concerns of automotive workers, and negotiated with those interests in mind.¹⁰⁷ Examination of the Saturn Agreement supports this conclusion. Although interests of the Saturn employees were arguably unique,¹⁰⁸ the Saturn

106. The General Counsel repeatedly commented on the ties between GM and the UAW, including union members' anticipation of the move to Saturn, Advice Memorandum, *supra* note 1, at 1192 (114,000 to 145,250 workers would be willing to work at Saturn), the long-standing relationship between GM and the UAW, *id.* at 1189 ("GM and the UAW have had a long and productive collective bargaining relationship."), and their present joint ventures, *see id.* at 1188 ("GM and the UAW reached agreement on a national contract . . . which included the development of a . . . program to protect employees from layoff . . ."). The General Counsel nevertheless sidestepped a reference to the relationship and negotiations of the Saturn Agreement as a "collective bargaining relationship." *See id.* at 1191 ("The current evidence is insufficient to establish that GM and UAW . . . have entered into a functioning collective bargaining relationship before any employees have begun working at Spring Hill."). Recognition of such a relationship would have jeopardized the General Counsel's solution to the problem of early recognition of the UAW: conditioning the Saturn Agreement's implementation on the UAW's future achievement of majority status. *Id.*

107. *See supra* note 32 and accompanying text; *infra* notes 111, 114-15 and accompanying text. As the NLRB observed, UAW leadership must consider "the desires and the needs of the various employees . . . on the basis of employee classification, plant product, fabrication function, and other criterion [sic] which bear no relationship to any single plant unit concept, and which cut across and completely disregard the original unit certifications." General Motors Corp. (Cadillac Motor), 120 N.L.R.B. 1215, 1220 (1958). Employees in each local unit must ratify this national contract before it becomes effective. *Id.*

108. The Saturn Agreement contained several provisions unlike those in

Agreement was written in only very general terms, with clauses providing for future changes if necessary.¹⁰⁹ In addition, the Agreement focused on wages and job security, primary areas of concern to all auto workers. Negotiators from the UAW were undoubtedly well-versed in these areas.

The individual interests of new Saturn employees were also protected by the oversight power of the existing membership. Aware that negotiations at one facility could have repercussions at their own facilities, the existing membership monitored the activities of UAW leaders.¹¹⁰ Industrywide unions, particularly those in the auto industry, may have to make certain concessions at one site to protect the industry as a whole.¹¹¹ In return for those concessions, plant workers know

other labor contracts. Saturn employees were to be compensated on a salary basis, unlike other auto workers who are traditionally paid on an hourly basis. Also unlike other labor agreements, the Saturn Agreement provided for consensus decision making within independent work units, a strong job security clause, and a compensation program based partially on merit. Saturn Agreement, *supra* note 1, at 9-11, 15-18.

109. See, e.g., *id.* at 28 ("The parties are specifically empowered to make mutually satisfactory modifications, additions or deletions to the Agreement.").

110. See Slaughter, *UAW Convention Debates 'Saturnization'*, LABOR NOTES, July 1986, at 16, 16. This monitoring results from the industry tradition of creating a pattern contract that is emulated in all later negotiations. See *infra* note 114 and accompanying text. For example, a wage reduction at one plant could damage conditions at other plants.

The UAW leadership did not give final approval for the Saturn Agreement without subjecting the issue to debate among the present membership. Members questioned the Agreement's impact on traditional forms of bargaining and on other plants in the industry. Some workers voiced concern that a pattern of relinquishing concessions to obtain early cooperation would be established. Despite the extensive debate by present membership, a resolution calling for no changes was adopted. *Id.* at 16-17.

One labor expert asserts that union leadership is restricted by the union members' dominant loyalty to the local union. Summers, *supra* note 70, at 387 (the reach of the national union "is limited, for the union member's dominant loyalty is almost always to his local union and he jealously defends its autonomy against encroachments by the national union"). Also, American labor leadership obviously cannot stray far from membership opinion, because in most unions officers are directly elected. *Id.* See generally J. STIEBER, GOVERNING THE UAW 160-68 (1962) ("[The] entire political structure of the UAW . . . is geared to keeping the leadership attuned to what the membership is thinking . . .").

111. See Hildebrand, *Joint Negotiation, a Match of Bargaining Power*, MONTHLY LAB. REV., July 1968, at 22, 23. Hildebrand states: "To match business bargaining power, the unions are seeking increased power for themselves, by centralizing the ambient of negotiations. To do so, they must sacrifice the tradition of local negotiations and organizational autonomy, a price that they seem quite willing to pay." *Id.* Traditionally, local unions concede to industry

that their interests are protected on an industry-wide scale. The practices of the auto industry and the Saturn parties, together with roughly similar working conditions throughout the industry, indicate that the General Counsel correctly determined that the "election" unit distinction is an arbitrary distinction. In an industry dominated by one or several large unions, such a distinction exists merely to allow more efficient administration of labor relations.¹¹²

In addition to the safeguards provided by the Saturn Agreement and the existing membership, the General Counsel found that the historical relationship between the UAW and the automakers gave additional protection to individual interests. National UAW leaders traditionally negotiate for most auto plants in the United States,¹¹³ developing a contract with one automaker that is followed at all other auto plants.¹¹⁴ Plant level negotiations normally supplement the negotiations of the larger contract for the entire industry.¹¹⁵ Cooperative concessions in times of recession indicate that the UAW and the

union negotiators on issues of wages and job security while retaining negotiating power over items of local interest. *See Another Look at Coordinated Bargaining*, MONTHLY LAB. REV., Sept. 1968, at III, III-V.

112. In effect, the many election units function as part of the same bargaining unit. Legal theory does not recognize an integrated relationship between separate "election" units as the automobile plants traditionally have been treated, but does support an integration of the "bargaining" unit. *See General Motors Corp. (Cadillac Motor)*, 120 N.L.R.B. 1215, 1218, 1220 (1958) (election historically held at one plant at a time, but workers can lawfully negotiate at multiplant level); *supra* note 32 and accompanying text.

113. In 1937 General Motors recognized the UAW as bargaining agent, and was soon followed by Chrysler. J. RAE, *THE AMERICAN AUTOMOBILE INDUSTRY* 82 (1984). In 1941 the UAW began negotiating with the Ford automotive facilities, establishing itself as sole collective bargaining agent throughout the American automobile industry. *See id.* at 83.

114. *See General Motors Corp. (Cadillac Motors)*, 120 N.L.R.B. 1215, 1218 (1958) ("UAW and GM have engaged in single common, centralized bargaining negotiations for all the plants . . . [from which] there emerged . . . a single contract, nationwide and company-wide in scope . . ."). The practice is referred to as pattern bargaining. *See, e.g., R. REICH & J. DONAHUE, NEW DEALS: THE CHRYSLER REVIVAL AND THE AMERICAN SYSTEM* 121 (1985) (UAW President, Douglas Fraser, refers to Chrysler concessions as a departure from the industry-wide pattern, defying "42 years of tradition"). Workers at all union-represented American auto plants have come to expect to receive similar wages and benefits. *See id.*

115. *General Motors Corp. (Cadillac Motor)*, 120 N.L.R.B. at 1219 (national contract provides for separate supplemental agreement at the plant level). Because the NLRB does not assume to choose the most appropriate unit, but only one of several proper choices, the bargaining units are free to reconsolidate to bargain together.

automakers have developed a stable negotiating relationship.¹¹⁶ By assuming that the preexisting relationship between GM and the UAW protected individual interests, the General Counsel accurately assessed the stable negotiating practices that already exist in the auto industry.

The Saturn Agreement did accomodate individual, plant-specific interests, however. By conditioning the Saturn Agreement on the employees' approval,¹¹⁷ the General Counsel adequately addressed the specific concerns of Saturn employees. The Agreement provided that either party could change its terms following the full staffing of the Saturn plant.¹¹⁸ In addition, the Agreement conditioned majority status on the creation of an attractive agreement for newly hired Saturn employees. Like the accretion situation, transferring UAW members and new unaffiliated employees would not automatically grant majority status to the union.¹¹⁹ By requiring majority approval at the time of Saturn's opening, the General Counsel protected unaffiliated employees from a potentially adverse, irrevocable agreement negotiated by leadership that could be perceived as inadequately representing the interests of unaffiliated employees.¹²⁰

These considerations support the General Counsel's conclusion that the early negotiations adequately protected individual interests. By assuming that those negotiations were lawful, however, the General Counsel avoided in-depth analysis of the Saturn Agreement's possibly discriminatory impact upon non-union workers.¹²¹ Given the Foundation's obvious concern for preserving the rights of the individual, the General Counsel's inattentiveness to the discrimination issue flaws the opinion.

116. See *Pleas for Wage Relief Flood into the UAW*, BUS. WK., Feb. 16, 1981, at 27, 27 ("Not only are some 72,000 Chrysler workers taking pay cuts . . . but thousands of UAW members employed by Chrysler suppliers are also agreeing to wage freezes and other sacrifices.").

117. Advice Memorandum, *supra* note 1, at 1191.

118. Saturn Agreement, *supra* note 1, at 28-29.

119. Advice Memorandum, *supra* note 1, at 1190 ("[I]t is not a foregone conclusion that employees will be actually represented by the UAW . . .").

120. Board policy does not assure individual employees of a right to choose their own contract terms upon hiring, but does attempt to limit representation to those with similar interests. As one AFL-CIO employee stated: "Every union member has a first day at work when you work under a contract into which you had no input. Terms can be changed the next time the local union bargains with the company." Telephone interview with Karin Green, Director of Labor Resource Service, AFL-CIO (Feb. 11, 1987).

121. See *supra* notes 83-87 and accompanying text.

2. Implications of the Saturn Agreement for Nonunion Workers

The General Counsel completely ignored the cumulative industrywide impact if a Saturn-type agreement were adopted by other companies. The Saturn Agreement guaranteed that eighty percent of the work force at the new site would be affiliated with the UAW.¹²² The potential for a coercive environment is readily apparent. Workers seeking entry into the industry will undoubtedly attempt to maximize their job opportunities by affiliating with a union that obtains obvious preferences. Although the Saturn Agreement may not overtly discriminate against individuals currently in the industry, these agreements may create an incentive to join a union simply to expand job opportunities.

The General Counsel also failed to consider whether the Saturn Agreement adequately protected unaffiliated workers. While acknowledging that the preference given to UAW-affiliated bargaining units could detrimentally affect the employment prospects of unaffiliated workers,¹²³ the General Counsel reasoned that the preference was not discriminatory because it extended the job preference at Saturn to nonunion members affiliated with UAW units.¹²⁴ In taking this position, however, the General Counsel ignored the effect of the Saturn Agreement on nonunion workers not affiliated with the UAW. Because the Agreement gave current GM employees a hiring preference, other workers could not improve their chances of being hired at Saturn by joining the UAW.¹²⁵ In the sense that management refused to consider a worker because of a lack of affiliation with the UAW, the Agreement was discriminatory.

The General Counsel provided no statistics indicating either how many members of UAW bargaining units were not union members or how many of these nonunion workers were likely to be precluded from employment. The General Counsel also provided no data as to the number of nonunion workers ac-

122. Saturn Agreement, *supra* note 1, at 14-15.

123. Advice Memorandum, *supra* note 1, at 1190; *see also supra* note 85 and accompanying text.

124. *See supra* notes 83-87 and accompanying text.

125. Candidates for work at Saturn cannot make themselves more attractive to GM by promising to join the UAW because the hiring preference extends to GM workers from UAW-represented units. A UAW member who is not in a GM unit may not receive the preference. This suggests that in addition to retaining a productive relationship with the UAW, GM also wanted the experience that workers from existing units could offer.

tually benefitted. It will be difficult in the future, therefore, to determine the number of nonunion employees within the unit that would make an agreement nondiscriminatory. Unfortunately, the General Counsel's opinion could be read to permit an employer to agree to hire predominately unionized units with only one or two nonunion members.

Despite these concerns, however, the General Counsel correctly found that the Saturn Agreement, in the context of a long-term labor relationship, did not discriminate against the individual employee. Although the Agreement gave a hiring preference at the Saturn facility to GM employees at other plants, that preference was nondiscriminatory. Assuming, as the General Counsel did, that the actions of the UAW and GM were the legitimate product of an existing relationship, the law permits labor and management to exclusively benefit union affiliates.¹²⁶ Likewise, any employee who pays union fees should enjoy the fruits of UAW negotiations. The benefits derived from unionism would be negated if unaffiliated workers were treated as affiliated workers. Furthermore, evidence indicates that GM's preferential hiring was not based on union affiliation, but rather was an attempt to obtain an experienced, skilled work force. As the General Counsel noted, the pool of workers available at Saturn included union and nonunion members. In effect, the Saturn Agreement merely facilitated access to that pool.

A discriminatory effect, regardless of the context, may also be justified when the benefits derived through cooperation are balanced against the possibly discriminatory effect. Given the substantial benefits of cooperation for most workers, the NLRB should tolerate an effect that may remotely discriminate against a few candidates if the parties' primary motive was not discriminatory.¹²⁷ As has been demonstrated in the United

126. Union contracts historically benefit their members and exclude those workers who do not choose union representation. Without the ability to collectively exclude those who do not choose unionism, the benefit of acting as a collective is destroyed. Workers would be free to act independently to the detriment of their fellow employees, yet reap the benefits of collective action. See *Not That Unusual*, NAT'L REV., Nov. 7, 1986, at 19, 19 ("Most unions exist to give monopoly power to their members. To the extent they succeed, they drive wages . . . higher than if the union did not exist.").

127. The Board does not assure every worker that he or she will be able to exercise § 7 rights upon hiring. It does, however, attempt to assure workers that those with similar interests did in fact choose the existing representative. For example, the Board has established the contract bar doctrine which precludes a rival union from challenging a current and valid contract for up to

States and other countries, cooperation in the early stages of plant development increases the workers' input into decision making, improves the work setting and conditions of employment, and establishes a rapport with management.¹²⁸ By increasing the worker's role in all facets of the work place, early cooperation can improve the quality of collective bargaining. As a result of early cooperation, a more democratic relationship develops between the employer and employees. The benefits to workers, management, and labor relations may outweigh the detriment to excluded candidates for employment.

3. The Effect of the Saturn Agreement on the Employee's Choice of Representation

The National Right to Work Foundation charged that the Saturn Agreement precluded the employees from freely choosing representation through an election or card count. The thrust of the Foundation's claim was twofold: premature recognition both precluded workers from voicing their opinions on representation and "tainted" any later recognition poll by unfairly benefitting the UAW. If the Saturn Agreement coerced employees to elect the UAW as the union representative, the Foundation's claims would be justified. Under the NLRA, the parties' conduct would have been unlawful.

Despite the assertions made by the Foundation, however, the Saturn Agreement provided individual employees with substantial opportunity to exercise their section 7 rights. By conditioning the continuation of the GM-UAW relationship at Saturn on a recognition poll, the General Counsel ensured that the workers would be permitted to accept or reject the union. In fact, the Agreement provided workers with a sample of the bargaining effectiveness of the UAW, effectively improving their knowledge before a vote. Early cooperation at Saturn also permitted the individual employee seeking labor representation to take part in immediate decisions that shaped the work environment and bargaining relationship, enhancing the quality of those rights. A narrow interpretation of section 7 of the NLRA would have precluded such participation.¹²⁹

three years following execution. *See, e.g.*, *Avco Mfg. Corp.*, 106 N.L.R.B. 1396, 1399-1400 (1953); *Electro-Metallurgical Co.*, 72 N.L.R.B. No. 253, 19 L.R.R.M. 1291 (1947). The contract bar theory sacrifices employee choice in order to "stabilize for reasonable periods of time established collective bargaining relationships." *Avco Mfg. Co.*, 106 N.L.R.B. at 1105.

128. *See supra* notes 11, 12 and accompanying text.

129. Without a flexible approach, the NLRB runs the risk of discouraging

In addition, the General Counsel would have been acting prematurely if it had discussed the effect of the Saturn Agreement on an upcoming election. Under the circumstances, the Board might not even require an election.¹³⁰ Normally, when an employer voluntarily recognizes a union, a card count is adequate to ensure majority status.¹³¹ Here, the enthusiasm of GM in engaging the UAW's participation indicates that the employees would voluntarily recognize the UAW at a later date. In such a situation, the effect of the Saturn Agreement upon the "laboratory conditions" of an election becomes irrelevant.¹³²

Furthermore, the argument that the Saturn Agreement gives an unfair advantage to the UAW is speculative, absent a challenge from a rival union.¹³³ Without such a challenge, the effect of the Saturn Agreement on an election cannot be determined.¹³⁴ As earlier noted, the timing of the benefit is particularly relevant to analysis of the effect of benefits upon an election.¹³⁵ The Board traditionally evaluates both the influence that the grant of benefits would potentially have on the employees and the employer's efforts to disassociate the benefits from the election.¹³⁶ Without evidence of GM's actions leading up to an election, it is impossible to determine whether the election setting was disrupted. As the current trend in labor law indicates, potential detriment is inadequate justification

cooperation. *See, e.g.,* Cordova, *supra* note 71, at 137 (bureaucracy and legal requirements are discouraging workers and management in Scandinavian countries from cooperation).

130. *See supra* notes 28-29 and accompanying text.

131. *See supra* note 29 and accompanying text.

132. *Cf. supra* text accompanying notes 34-37 (discussing Board view of activities disruptive of laboratory conditions).

133. *Cf. Advice Memorandum, supra* note 1, at 1191 n.8 (stating that claim by rival union against GM would not negate Saturn Agreement because the agreement remains a prediction of a relationship until the UAW achieves majority status).

134. The NLRA does not prohibit an employer from expressing a preference for a particular union. *See* 1 THE DEVELOPING LABOR LAW, *supra* note 8, at 286-87. Lawful cooperation is that "which does not have the effect of inhibiting self-organization and free collective bargaining." *Federal-Mogul Corp. v. NLRB*, 394 F.2d 915, 918 (6th Cir. 1968). To determine when a stated preference or cooperative actions have risen to the level of unlawful interference, the NLRB must examine the totality of the circumstances. *Coamo Knitting Mills, Inc.*, 150 N.L.R.B. 579, 582 (1964). Without a development of the record concerning the Saturn Agreement and evidence of unlawful support of the UAW, as opposed to a rival union, unlawful preference for the UAW remains a speculative assertion.

135. *See supra* note 45.

136. *See supra* note 45.

for preventing an agreement.¹³⁷

A final justification for the General Counsel's decision is the NLRA's goal of creating stability in labor-management relations by protecting the collective bargaining process.¹³⁸ The General Counsel emphasized that the Saturn Agreement established a promising pattern of cooperation and fortified the stable, existing collective bargaining relationship that had developed between a labor organization and management.¹³⁹ Protecting a long-standing relationship encourages workers to participate in collective bargaining and prevents immediate challenge from rival unions.¹⁴⁰ This in turn strengthens unions. They no longer need to focus resources on fighting for worker support, but can instead organize to promote their interests with management. In light of present economic conditions, the merits of the Saturn Agreement indicate that stabilization of the collective bargaining relationship will offset the detriment of a possible challenge to representation.

B. A RECOMMENDED APPROACH TO FUTURE COOPERATIVE VENTURES

To protect workers' interests in future cases involving early cooperation, the NLRB should focus on the similarities of interests between negotiators and newly hired workers. This will help to ensure that preliminary negotiations adequately

137. See *supra* note 105 and accompanying text. As suggested, the new trend in the courts is not to prohibit cooperation based on speculative reasons. As the courts recognize, a disincentive to attempt cooperation would be created by a policy which eliminated successful programs for unsubstantiated reasons. See Note, *supra* note 13, at 531 (under traditional § 8(a)(2) standards, employees only have option of a traditional union separate from the employer or no union at all; with new interpretation, their options are expanded.).

138. See Comment, *The National Labor Relations Act at Fifty: Roots Revisited, Heart Rediscovered*, 23 DUQ. L. REV. 1059, 1073-75 (1985) (purpose of the NLRA was to promote industrial peace through the elimination of the causes of strikes). The policy provision of the NLRA states:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes.

29 U.S.C. § 151 (1982).

139. See Advice Memorandum, *supra* note 1, at 1189 (the Saturn Agreement contains "many of the fruits" of a long and prosperous labor relationship).

140. The same theory underlies the doctrine of a contract bar. See *supra* note 128 and accompanying text.

protect workers' interests. As when determining the correct bargaining unit,¹⁴¹ the Board should determine the number of transferring employees, industry bargaining history and practices, the similarities between management at existing facilities and new facilities, working conditions, and the similarities in workers' desires and interests. By focusing on these factors, the General Counsel will be able to determine whether preliminary negotiations adequately protect the employees' interests.

These are not the only relevant considerations, however. The Board must also examine the relationship between management and the union to determine whether early negotiations promote an existing, prosperous relationship.¹⁴² Given the potentially discriminatory effect of early negotiations, the Board should accept a hiring preference only if a cooperative relationship exists between the parties.¹⁴³

The NLRB must also examine the time period between the early negotiations and a recognition poll to determine whether the terms of the agreement will unlawfully benefit a particular union to the detriment of rival unions.¹⁴⁴ In its analysis the Board should examine the type of benefits offered and the conditions placed on those benefits.

Finally, the NLRB should require that the contract contain a modification clause, permitting either party to alter the preliminary agreement if substantive changes occur. As the General Counsel indicated, the ultimate test of an agreement's legitimacy is the election or card count held upon the hiring of an initial complement of workers.

Cooperative ventures in the preliminary stages of plant development improve the workers' ability to control the conditions of employment. The NLRB should therefore encourage them in an effort to enhance industrial stability and peace. Despite the allegations of the National Right to Work Foundation, the facts show that individual employees' rights were not irrevocably denied by the Saturn Agreement. Given their substantially positive effects, the NLRB should encourage early cooperative agreements to benefit labor-management relations.

CONCLUSION

Pre-election cooperative agreements could threaten the

141. See *supra* notes 30-31 and accompanying text.

142. See *supra* text accompanying notes 108-12.

143. See *supra* text accompanying notes 128-29.

144. See *supra* text accompanying notes 134-38.

worker's right to determine union representation. Applying a pragmatic analysis to the cooperative Saturn venture, the General Counsel recognized that economic and industrial safeguards adequately met the protections required under existing doctrine. By focusing on stable industry practices and the overriding principles of the NLRA, the General Counsel established a flexible form of analysis for future Saturn-like claims. By conditioning the Saturn Agreement upon majority approval, the General Counsel ensured that the Agreement adequately protected Saturn employees' rights and supported the goal of industry stability. Although workers' rights remain critical to NLRA policy, they can be fostered, rather than inhibited, by cooperation in early stages of plant development.

Lori M. Beranek